

generous one" and would have probably reduced it had there been an appeal against its quantum. Another case Mr. Cashin relied upon was *Van der Velde v. Lim Seow Tat and another*<sup>(10)</sup> where Chua J. awarded \$45,000 for general damages. But this was a case where the whole of the plaintiff's right arm half way between the elbow and shoulder was amputated and he was hospitalised for 8 months, 2 in Singapore and 6 in Holland followed by another 5 months in Holland for further medical attention and training in the use of an artificial limb. He was a bank officer drawing a salary of about \$1,200 per month. These cases I have studied with care and find them clearly distinguishable from the instant case, in which the plaintiff was a drain cleaner who later became a feeding operator drawing a salary at the time of accident of only \$2.50 per working day. After the accident he worked on a scrap machine and his pay was increased to \$3.50 per working day. He did not lose the whole of his right hand. Only four fingers and part of the palm were amputated leaving the proximal half of the right palm and thumb intact. He was hospitalised for only 24 days and thereafter was treated as an outpatient for another 30 days. He was 33 years of age at the time of the accident. Taking all these factors into consideration I consider that a fair sum for pain and suffering, disability, loss of amenities and the possibility of future loss of earnings, would be \$14,500.

There will be judgment for the plaintiff in the total sum of \$15,650 and costs.

*Judgment for the plaintiff.*

Solicitors: *Murphy & Dunbar; Skrine & Co.*

## SHARIKAT EASTERN PLASTICS INDUSTRY v. SHARIKAT LAM SENG TRADING

[O.C.J. (Mohamed Azmi J.) July 5, 1971]

[Kuala Lumpur — Civil Suit No. 2303 of 1968]

*Contract — Breach — Failure to deliver goods — Time essence of contract — Waiver — No notice giving reasonable time to complete.*

The plaintiff firm claimed damages for breach of contract concerning delivery of certain machinery. In the written contract of sale, it was stipulated that shipment of the said machinery should be during July 1968. The machinery was not so shipped but the manager of the plaintiff firm entered into negotiations with the defendants. No notice fixing a reasonable time for the shipment and delivery of the machinery was given before the plaintiffs brought the action claiming damages for breach of contract.

**Held:** the plaintiffs had waived the initial stipulation making time the essence of the contract. If they wanted to make time again of the essence of the contract they should have given the defendants a notice fixing a reasonable time for the shipment and delivery of the machinery. As no such notice had been given, the action was misconceived and premature.

*Cases referred to:-*

- (1) *Tan Ah Kian v. Haji Hassan* [1962] M.L.J. 400, 402 approved and affd. [1963] M.L.J. 175.
- (2) *Webb v. Hughes* (1870) L.R. 10 Eq. 281 at p. 286.
- (3) *Wong Kup Sing v. Jeram Rubber Estate Ltd.* [1969] 1 M.L.J. 245.

- (4) *Charles Rickards Ltd. v. Oppenheim* [1950] 1 All E.R. 420.

### CIVIL SUIT.

*D. A. Devadason* for the plaintiffs.

*Peter Yeoh (Chew Biman with him)* for the defendants.

*Cur. Adv. Vult.*

**Mohamed Azmi J.:** The plaintiff firm claim for damages for breach of contract for non-delivery of one complete set of "CHUBU" Polyethylene Stretched Tapes Making Machine comprising of the following:—

- (i) one unit CS40 Extruder with TK650 Take-Up Unit;
- (ii) one unit Stretching machine including slit;
- (iii) one unit of 12 Spindles Rewinding machine;
- (iv) one unit of "TORRI" Brand 6 Spindle Balling Machine.

The action is based on contract of sale No. LST/026 dated May 17, 1968 by which the defendants as the sole agent of Chubu Machinery & Co. Ltd. of Osaka, Japan (hereinafter referred to as "the Japanese manufacturers") agreed to sell and the plaintiffs agreed to buy the said machinery at a price of £3,170, which is equivalent to M\$23,362.90. On the pleadings it is not in dispute that on June 12, 1968 pursuant to the said contract and in consideration of the delivery of the said machinery, the plaintiffs paid a sum of \$4,672.58 being twenty per cent of the agreed purchase price of the said machinery at the request and on the demand of the defendants. It is also not in dispute that the balance of the purchase price of \$18,690.32 was to be paid to the defendants on delivery of the said machinery.

The main issues in this case are:—

- (1) whether time is of the essence of the contract;
- (2) whether there is a breach of the contract by the defendants; and, if so, whether the plaintiffs have suffered damage in consequence thereof;
- (3) whether the contract has been superceded by a new contract and the original contract has been waived and the defendants discharged from liability.

On the first issue, the general principles as to time being the essence of the contract have been dealt with by Gill J. (as he then was) in the case of *Tan Ah Kian v. Haji Hassan*,<sup>(11)</sup> a decision approved and affirmed by the Federal Court. The three situations in which his Lordship had considered time to be the essence of the contract are:—

- (i) where the parties have expressly stipulated in the contract that it shall be so;
- (ii) where it was not originally stated to be but has been made so by one party by giving reasonable notice to the other, who has failed to perform the contract with sufficient promptitude, and
- (iii) where from the nature of the contract or of its subject matter time must be taken to be of the essence of the agreement.

What is the evidence in the present case? First, there is the C.I.F. contract document itself which

specifically provides that shipment of the said machinery should be "during July 1968". Secondly, there is the letter dated April 26, 1968 written before the contract was concluded by the Japanese manufacturers in which it was stated that shipment of the machinery would take two to three weeks. This was in answer to the query made in Exhibit B1 as to the time taken by sea from Osaka to Port Swettenham. Finally, there is the admission made by D.W.1 and D.W.2 in their evidence that shipment of the machinery was supposed to be during July 1968, and that from Japan to Port Swettenham, shipment would take three to four weeks. Further, in explaining why shipment should be during July 1968 when the contract was made on May 17, 1968, D.W.2 said:

"Normally it takes two to three months to assemble machines in Japan for shipping. That accounts for the difference in time between ordering in May and shipping in July 1968."

From the above evidence, I am satisfied that there is a stipulation in the contract itself making time of the essence of the contract, and from the surrounding circumstances there is no evidence to suggest it was not the intention of the parties to make time of shipment "during July 1968" and time of delivery some time in August 1968 the essence of the contract.

Having found that time is the essence of the contract, the next issue to be determined by the court is whether there was a breach of contract by the defendants. For the determination of this issue, it is necessary to pursue the events that took place after the contract was concluded on May 17, 1968. The evidence of P.W.1, the manager of the plaintiff firm, shows he agreed that up to September 9, 1968 negotiation was still going on between the parties. This is supported by documentary evidence as contained in the agreed bundles of documents. The first relevant letter was dated August 10, 1968 from the plaintiffs to the Japanese manufacturers wherein the plaintiffs asked the actual date of shipment of the machinery and other particulars relating to the machines. The second letter was dated September 9, 1968 — again written by the plaintiffs to the Japanese manufacturers wherein they stated as follows:

"Messrs. Lam Seng have clearly stated to us that the same Machines which they bought from you was not given them satisfaction and they now want you to defer shipment of our Machines, so that you can remodify them to your best ability. Under such reports from them we think that if the Machines which we ordered are the same as Messrs. Foo Ming Plastic Co., we will want you to ship immediately."

The next relevant letter was dated September 23, 1968 from the plaintiffs to the defendants as follows:

"We acknowledged receipt of your letter and we confirmed we wanted the machines as Messrs. Foo Ming Plastic's model. Therefore, please open the L/C to-day as you promised and let me know the exact date of the machines arrived."

From these correspondence, I find that even up to September 23, 1968 negotiation was still going on between the parties and also between the plaintiffs and the Japanese manufacturers not only regarding date of shipment and delivery of the machinery but also the type or model of the machinery to be delivered. In other words, after having stipulated that shipment should be "during July 1968" and delivery in August

1968, the plaintiffs allowed the time to pass and continued to negotiate. In my view, the plaintiffs allowed the time of shipment and delivery to pass because they knew that the machines which they had ordered might be defective and it was only when they sent the letter of September 23, 1968 referred to above (Exhibit C11), that they finally made up their mind and confirmed that they wanted the machines similar to Messrs. Foo Ming Plastic, presumably irrespective of whether or not they were satisfactory.

In *Webb v. Hughes*,<sup>(2)</sup> Sir R. Malins V.C. said:

"But if time be made of the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated."

The above *dictum* was approved by Raja Azlan Shah J. in *Wong Kup Sing v. Jeram Rubber Estate Ltd.*<sup>(3)</sup> where His Lordship held that "once time for completion was allowed to pass and the parties went on negotiating time was no longer of the essence of the contract..."

Similarly, in the present case, it is clear that there is an initial stipulation making time of the essence of the contract between the plaintiffs and the defendants, namely, that the said machinery was to be shipped from Japan "during July 1968". Although there is no stipulated time as to delivery in the contract itself, it is stated in Exhibit B2 that it will take two to three weeks for shipment from Japan to Malaysia. Taking the time of shipment at the end of July 1968, the two or three weeks period would be up on or about August 21, 1968 at the latest. The defendants' witnesses, however, alleged that shipment would take three to four weeks. Whatever might have been the period of shipment is immaterial, for the time of shipment has plainly been exceeded. The plaintiffs could have cancelled the contract there and then when the machinery was not shipped from Japan by the end of July 1968, but they did not do so. By indulging in further negotiations and at the same time by pressing for time of shipment and delivery, they have, in my view, waived the stipulation as to time. The stipulated time having been waived, the time became at large and that thereupon the defendants' only obligation was to deliver within a reasonable time. In my opinion, what is a reasonable time is a question of fact to be decided on the circumstances of each case. In Exhibit C11 dated September 23, 1968 the plaintiffs made enquiry when the machinery would be delivered, but no time was specified within which shipment or delivery should be made. Taking September 23, 1968 as the relevant date, was the failure of the defendants to deliver the machinery by November 5, 1968 unreasonable? I do not think it was unreasonable under the circumstances of the present case. In my view, when time is no longer the essence of the contract, one and a half months cannot constitute delay on the part of the defendants in the face of the

unchallenged evidence of D.W.2 that it would normally take two to three months to assemble such machines in Japan for shipment. I, therefore, find that the defendants have not committed a breach of contract for non-delivery of the machinery. On the contrary, by issuing the notice of action the plaintiffs were, in fact, technically acting in breach of the contract and, to my mind, it was unreasonable for the plaintiffs to terminate the contract and to demand damages on November 5, 1968.

The original stipulation in regard to time having been waived by the plaintiffs, in my view, before taking the present action for breach of contract, the plaintiffs should have given reasonable notice to the defendants requesting delivery within a stated period. Instead, after confirming by letter dated September 23, 1968 that they wanted the type of machines as supplied to Messrs. Foo Ming Plastic, the plaintiffs appeared to have negotiated direct with the Japanese manufacturers leaving the defendants temporarily out of the picture. In my view, Exhibit C11 is insufficient to constitute the requisite notice. The exchange of letters between the plaintiffs and the Japanese manufacturers between October 8 and November 1, 1968 clearly indicates that there was a negotiation between them during this period for the plaintiffs to purchase the machinery direct from the Japanese manufacturers. But, I am satisfied from the evidence that after discovering that the terms of the Japanese offer were less favourable than those in the original contract the proposed contract was never in fact executed. This is unmistakably shown in the translation of Exhibit C15 dated October 30, 1968. On this issue, I do not accept the evidence of the defence witnesses that the plaintiffs had entered into an oral agreement with the Japanese manufacturers some time between 23rd and 27th September, 1968 at Metro Restaurant superseding the original contract between the plaintiffs and the defendants. In my view, there was no novation in this case. There is insufficient evidence to prove that the Japanese manufacturers had agreed either verbally or in writing to take over the legal obligation of the defendant firm. The alleged oral agreement at Metro Restaurant had been vehemently denied by P.W.1 and P.W.2, and as no representative of the Japanese manufacturers had been called to give evidence, by virtue of section 114(g) of the Evidence Ordinance, I would presume that if Mr. Ikushima or his representative had been called he would have given evidence against the defendants. Further, if it were true that the plaintiffs had entered into the alleged new agreement on or about September 23, 1968, why should the plaintiffs on the same date request the defendants by letter to execute the order as contained in Exhibit C11. On the balance of probabilities, I accept the plaintiffs' story that the alleged new agreement was merely a proposal by the Japanese manufacturers which was never accepted.

In the present case, if the plaintiffs had wanted to make time again of the essence of the contract, they should have given the defendants a notice fixing a reasonable time for the shipment and delivery of the machinery. Thus, in *Charles Rickards, Ltd. v. Op-*

*penheim*,<sup>(4)</sup> it was held that where there was an initial stipulation making time of the essence of the contract, the promisee after waiving that initial stipulation was entitled to give a reasonable notice making time of the essence of the matter, whether the contract was for sale of goods or for work and labour. In the present case, the plaintiffs had not given any such notice to make time again the essence of the contract. In the absence of such a notice, I find the present action is misconceived and premature.

For the above reasons, the plaintiffs' claim is dismissed with costs.

*Claim dismissed.*

Solicitors: D. A. Devadason; Chew Biman & Co.

## OTHMAN BIN DOL v. PUBLIC PROSECUTOR

[A.Cr.J. (Wan Suleiman J.) July 30, 1971]

[Seremban — Criminal Appeal No. 39 of 1970]

*Road Traffic — Admissibility of information given — Road Traffic Ordinance 1958, ss. 36(1), 140A, 141, 146(1)(a).*

*Road Traffic — Evidence — Standard of proof — Determination of guilt or innocence.*

The appellant had been charged with driving a motor taxi without reasonable consideration for other persons using the road. The learned magistrate in calling on him for his defence said that his reason for doing so was because he had admitted having been involved "in the accident". A police officer gave evidence that in the course of investigations the defendant admitted that he was the driver of the motor taxi BT 1621 which was involved in the accident. The learned magistrate in his judgment said: "Having thus weighed the evidence on both sides which was based purely on facts, the court found that on the balance of probability the defence had not thrown sufficient doubt on the prosecution story, so as to warrant acquittal of the defendant".

Held, allowing the appeal: (1) information given under section 141 of the Road Traffic Ordinance is only admissible for the purpose of determining by whom the vehicle was being driven. Any other admission which goes beyond this would be inadmissible;

(2) in this case the admission by the appellant that the motor taxi was involved in the accident was wrongfully admitted in evidence and this wrongful admission had occasioned a failure of justice;

(3) the learned magistrate was wrong in approaching the question of guilt or innocence of the appellant on the basis of the balance of probabilities. What the learned magistrate had to decide was whether the defence had raised a reasonable doubt as to the truth of the prosecution case.

Cases referred to:

(1) *Public Prosecutor v. Yuvaraj* [1969] 2 M.L.J. 89, P.C.

(2) *Mohamed Yatim bin Abu Bakar v. Public Prosecutor* [1950] M.L.J. 57, 59.

## MAGISTRATE'S CRIMINAL APPEAL.

Miss Sinnadurai for the appellant.

Mohamed bin Haji Mohamed Said (Deputy Public Prosecutor) for the respondent.

*Cur. Adv. Vult.*

Wan Suleiman J.: The appellant Othman bin Dol was charged with driving his motor taxi No. BT 1621 without reasonable consideration for other persons